"Affirmative Action" — Reverse Discrimination or Distributive Justice? The Role of the US Supreme Court

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The term "affirmative action" — first used by the Roosevelt Administration in an executive order in 1941 barring defense contractors from discriminating against minorities — was revived by President John F. Kennedy in a civil rights speech in 1961. Subsequently it was included in the language of the Civil Rights Act of 1964, but it was through Lyndon B. Johnson's Executive Order 11246 (1965) concerning nondiscrimination in government employment that it became a central political and legal concept: "The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."[1]

Initially the term was taken to mean "a positive effort" to end discriminatory practices in employment situations. Since then the concept has undergone a long process of reinterpretation and redefinition, primarily by the Executive Branch and the courts. This article will address the role of the US Supreme Court in this process, analyzing the Court's affirmative action decisions from 1978 to 1990. Four aspects of two main areas — education and employment — will be dealt with: admission, hiring, promotion, and lay-offs.

1 Executive Order 11246 (1965), Section 202, (1).

The first case to reach the Supreme Court was *DeFunis v. Odegaard* (1974), but a majority of the justices decided that the case was moot, since it no longer presented a live controversy. It was therefore *University of California Regents* v. *Bakke* (1978) that came to be the harbinger of the new age of affirmative action litigation. The majority held that the controversy could be settled under Title VI of the Civil Rights Act of 1964 (barring discrimination in programs receiving federal assistance) without involving constitutional issues, although Justice Lewis F. Powell, Jr., found the Title VI ban and the equal protection clause of the 14th Amendment coextensive (and hence that both were violated). The court (5-4) thus found the use by the University of California at Davis of a set-aside provision (16 out of 100 seats in a freshman class in Medical School) for certain racial minority group members a violation of the statute. However, Justice Lewis F. Powell joined the minority on the second count, whether race may ever be taken into account as one factor among several in order to create a "diverse student body." Racial classifications are not always unconstitutional, said Powell, provided they are proven "necessary to promote a substantial state interest."[2] Thus he employed the "strict scrutiny" standard of review for racial classifications.

The next case to reach the Court, *Steelworkers of America v. Weber* (1979), represented the area of training and promotion. Brian Weber had filed suit on a "reverse discrimination" charge when he failed to be selected for a skilled-job training program at Kaiser Aluminum, Gramercy, La. The company and the union had agreed to a voluntary affirmative action plan which reserved 50% of all in-plant craft training slots for minorities.

Again the controversy was dealt with under the Civil Rights Act, this time Title VII, which outlaws discriminatory practices in employment. Reversing the lower courts, the majority held that Congress could not have intended to prohibit private employers from voluntarily instituting affirmative action plans to open opportunities for blacks in job areas traditionally closed to them. The Court was careful to distinguish between the language of Title VII and that of Title VI, which concerns programs receiving federal aid. In Title VI, said Justice William Brennan for the majority, "Congress was legislating to assure federal funds would

2 University of *California Regents* v. *Bakke,* 438 U.S. 265 at 307 (1978).

not be used in an improper manner. Title VII, by contrast, was enacted pursuant to the Commerce power to regulate purely private decision making and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments," which guarantee equal protection of the laws against state and federal infringement.3

In separate dissents Chief Justice Warren Burger and Justice William Rehnquist took exception to the majority's interpretation of Title VII and its legislative history. Burger wrote: "Under the guise of statutory 'construction,' the Court effectively rewrites Title VII to achieve what it regards as a desirable result. It 'amends' the statute to do precisely what both its sponsors and its opponents agreed the statute was not intended to do" (at 216). Rehnquist was even harsher in his verdict: The Court's opinion was "reminiscent not of jurists such as Hale, Holmes and Hughes, but of escape artists such as Houdini." The majority "elude[d] clear statutory language, 'uncontradicted' legislative history, and uniform precedent in concluding that employers are, after all, permitted to consider race in making employment decisions" (at 222). The main point made by the then Chief Justice and his successor in that office was that the act forbids any kind of discrimination on account of race, benign as well as invidious.

The third case to appear before the Court combined two aspects of the preceding cases, quotas and employment, challenging on constitutional grounds the decision by Congress in the Public Works Employment Act of 1977 to set aside 10% of federal funds for contracts with minority-owned businesses. However, in *Fullilove v. Klutznick* (1980), the Court (6-3) held such set-asides permissible. The Chief Justice, speaking for the Court, pointed out that this act was designed to prevent procurement practices that Congress had decided might result in the perpetuation of the effects of prior discrimination: "Congress has necessary latitude to try new techniques such as limited use of racial and ethnic criteria to accomplish remedial objectives."4

Some jurists had a hard time seeing a logical line in Chief Justice Burger's arguments in Weber and Fullilove respectively. Actually, the solid majority in favor of the quota system in Pullilove was seen by many legal scholars as a clear victory for a broad interpretation of the

3 *United Steelworkers of America v. Weber, Kaiser Aluminum v. Weber, United States v. Weber,* 443 U.S. 193 at 206, footnote 6 (1979).

4 *Fullilove v. XKutznick,* 448 U.S. 448 at 473 and 490 (1980).

concept of affirmative action. Consequently, the Court's decision in the next case was anticipated with special interest, since by this time a Reagan appointee, Sandra Day O'Connor, had replaced the middle-of-the-road Eisenhower appointee Potter Stewart. The case represented an important question of principle, since it involved the issue of lay-offs and the preservation of gains under affirmative action programs.5

The Memphis fire department, operating under a consent decree settling charges of racial discrimination against the department, had laid off several white workers with longer seniority than some black firefighters hired under the affirmative action decree. The sacked white firefighters sued the department, claiming "reverse discrimination" and demanding that the general rule of "last hired, first fired" be observed. The Reagan Justice Department, in its friend-of-the-court brief, argued that the firemen's seniority system was immunized by the 1964 Civil Rights Act against judicial encroachment (unless the system was proven to have been designed with the intent of discriminating against minority employees). Thereby the Administration was clearly trying to limit the reach of affirmative action measures.

The Court agreed (6-3) with the Administration, holding that the federal judge had overstepped his powers when he overrode the seniority rule to preserve the jobs for the junior black firemen. The Reagan Administration hailed the decision and was quick to send a memorandum to state governments asking them to revise their affirmative action programs in light of the decision. However, Justice Byron White (the only Kennedy appointee on the Court), writing for the majority, had stuck closely to the facts of the case. They had found unconstitutional the court order that actually asked the city to ignore traditional seniority principles. At the same time, however, they pointed out that Congress in the Civil Rights Act of 1964 certainly had intended to provide remedies for persons who had themselves been victims of illegal discrimination.

Proponents of affirmative action saw the Stotts decision as a major curtailment of the concept as a political tool. Beforehand many legal scholars had considered Stotts an ill-suited test case because it attacked the age-old principle of seniority head-on, providing virtually no opportunity for compromise or partial gains. The concept of affirmative action now seemed reduced to make-whole suits, limited to cases involving

5 *Firefighters Local Union No. 1784 v. Stotts et al.,* 467 U.S. 561 (1984).

blatant discrimination against identifiable individuals in particular situations. The usefulness of the concept of "affirmative action" was thereby greatly diminished, since providing evidence of such discriminatory practices is a very difficult task. A business practice may be neutral on its face but still have discriminatory effects.

In 1986, after Reagan had added another of his "strict constructionists"—Antonin Scalia—to the High Bench and elevated William Rehnquist to the Chief Justice seat, an interesting development took place concerning the Court's view of affirmative action. In three cases the Court clearly modified the restrictive view it had seemed to hold in Stotts. Admittedly, in a lay-off case very similar to Stotts, *Wygant* v. *Jackson Board of Education* (1986), the Court held (5-4) that in laying off white teachers while retaining blacks with less seniority, the school board of Jackson, Michigan, had deprived the former group of equal protection of the laws, in violation of the 14th Amendment. The voluntary agreement between the school district and the union was not based on findings of previous discrimination, nor was it narrowly tailored enough to be acceptable, said the Court majority.

However, in several opinions making up the majority ruling, the justices made it a point to underline that affirmative action was broader than the interpretation held forth by the Reagan Administration. Justice Powell declared: "As part of this nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear the burden of the remedy."[6] The Court is in agreement," stated Justice O'Connor likewise, that "remedying past or present racial discrimination by a state actor is a sufficiently weighty interest to warrant the remedial use of a carefully constructed affirmative action program" (at 286). Thereby the Court majority ascertained that the concept of affirmative action was wider than a mere make-whole remedy for proven cases of concrete, individual discrimination. A significant point to note in this context is that Justice O'Connor had clearly moved away from the minimalist position of the Reagan Administration.

Justice Powell made a clear distinction between remedies acceptable in hiring and firing respectively. He was willing to grant more leeway in applying affirmative action considerations in the former than in the latter instance, since in hiring "the burden to be borne by innocent individuals

6 *Wygant* v. *Jackson Board of Education,* 476 U.S. 267 at 280-281 (1986).

is ... diffused generally," whereas in the latter situation the loss of a job is a much more painful experience (at 282).

That the Wygant case represented a turning point in the Court's view of affirmative action was confirmed by two rulings a few weeks later, at the close of the session. Typically, it was the most prominent liberal voice on the Court, William Brennan, Jr., who penned the majority opinion in both cases. In *Local #28 of the Sheet Metal Workers' International v. Equal Employment Opportunity Commission,* the Court (5-4) upheld an order requiring a New York union, which had consistently refused blacks, to increase its nonwhite membership to 29.23% by August 1987.7 In *Local #93, International Association of Firefighters v. City of Cleveland and Cleveland Vanguards,* the Court (6-3) held that the Civil Rights Act of 1964 did not prevent the city from settling a bias complaint by adopting a plan which promoted one black firefighter for every white promoted.8

Significantly, Justice O'Connor, who dissented in the Local #28 case, criticizing quotas as unacceptable, in the Local #93 case joined the majority, accepting the one-to-one provision as a viable tool to augment black membership in the higher echelons of the work force. Here it is quite difficult to see the philosophical and philological distinctions between quotas, goals, and timetables. The main difference, as she saw it, was that the fifty-fifty provision of the latter case was an instrument to implement the objective of increasing the proportion of blacks in the various brackets of employment, whereas the former case set a specific goal, which was indistinguishable from a quota.

Another interesting thing to note in the Court's proceedings that session was the dominant role played by the grand old liberal on the Court, William Brennan, one of President Eisenhower's legendary "mistakes."[9] Chief Justice Rehnquist's determination to make a principled pitch to mark his ideological position throughout the session sent him and Justice Scalia into permanent dissent—joined only by the increasingly con-

7 *Local #28 of the Sheet Metal Workers' International v. Equal Employment Opportunity Commission,* 478 U.S. 421 (1986).

8 *Local #93, International Association of Firefighters v. City of Cleveland and Cleveland Vanguards,* 478 U.S. 501(1986).

9 The statement has been attributed to the president that he made two mistakes as president and that both were on the Supreme Court, which meant the two liberals Earl Warren and William Brennan, Jr.

servative Byron White and, from time to time, by another swing vote—allowing in the main Brennan to play a dominant role.

In the succeeding session the Court continued to pursue its liberal line in the field of affirmative action with Justice Brennan still in the driver's seat. In *United States v. Paradise,* the Court (5-4) in February 1987 upheld an affirmative action plan promoting black Alabama state troopers on a one-to-one scheme.[10] The Alabama Department of Public Safety had a long tradition of discrimination. In 1983, eleven years after it had been sued for discriminatory practices against blacks (1972), the department had made virtually no progress, and a fifty-fifty plan was therefore imposed by a federal judge to enhance the promotion of blacks. Justice Brennan, again writing for the majority, described the plan as "amply justified, and narrowly tailored to serve the legitimate and laudable purposes" of eradicating a history of blatant discrimination (at 232). This time O'Connor swung back to her former conservative position, joining Rehnquist, White, and Scalia. Justice Powell remained with the liberal bloc made up of Brennan, Marshall, Stevens, and Blackmun.

The liberal line of affirmative action decisions peaked a month later. In *Johnson v. Transportation Agency, Santa Clara County, California,* the Court extended the principle of affirmative action to cover women's employment situation.[11] A voluntary affirmative action plan adopted by the Santa Clara County Transportation Department to elevate women into high-ranking positions was upheld by the Court (6-3) under Title VII of the Civil Rights Act. Diane Joyce had been promoted to road dispatcher, being preferred because of her sex, over Paul Johnson (who had scored slightly higher in a screening interview). Johnson, in turn, filed a "reverse discrimination" suit against the agency.

Justice Brennan, writing for the Court, drew the line from the Weber decision (1979) regarding voluntary affirmative action programs by employers, this time extending the principle to public employers. In his view, the Santa Clara plan was "a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the agency's work force" (at 1457). A highly significant point in this decision was that statistics would suffice as evi-

10 *United States* v. *Paradise,* 94 *L Ed* 2d 203.

11 *Johnson v. Tranportation Agency, Santa Clara County, Cal.,* 107 S.Ct. 1442 (1987).

dence of discriminatory practices. No proof of discriminatory intent was called for.

The following year no affirmative action rulings were issued by the Supreme Court. However, a replacement was found for Lewis F. Powell, Jr., who had retired in June 1987, at the close of the 1986 session. After President Reagan's highly ideological and controversial nominee, Robert Bork, had gone down in defeat in the Senate hearings, a nearly as conservative, but far more anonymous appointee was found in Anthony Kennedy. Some liberal observers have claimed that the Senate in this case was tricked into accepting pest over cholera as a result of battle fatigue. I will let that issue rest, but it is quite clear that Justice Kennedy's entrance in replacement of Justice Powell, the swinger, initially meant a general conservative turn of the Court, also regarding "affirmative action."

A clear hint of an incipient change in the Court's view of affirmative action cases was given in a civil rights case involving "disparate impact," *Watson* v. *Fort Worth Bank & Trust,* in the last month of the Court's sitting in the spring of 1988.12 Although Anthony Kennedy took no part in the consideration or decision of the case, his presence seems to have had a symbolic impact. The Court was basically in agreement on most parts of the case, but a significant split occurred over Parts II-C and II-D, involving the question of "disparate impact" and the burden of proof in such instances. Here Justice O'Connor—supported by Rehnquist, Scalia, and White—claimed that the "extension of disparate impact analysis calls for a fresh and somewhat closer examination of the constraints that operate to keep that analysis within its proper bonds" (at 994). Signaling a change in the Court's traditional standard on this point even more clearly, Justice O'Connor explicated further: "Moreover, we do not believe that each verbal formulation used in prior opinions to describe the evidentiary standards in disparate impact cases is automatically applicable in light of today's decision" (at 994, fn.. 2).

The entire Court agreed that disparate impact analysis may be applied to a subjective or discretionary promotion system (at 985-991, 999-1000). Where the pluralities speaking through Justices O'Connor and Blackmun respectively (the latter joined in part by Justice Stevens) were at loggerheads was on the burden of and nature of proof. In O'Connor's

12 487 U.S. 977 (1988).

view, reliance on statistics as prima facie evidence of different treatment could lead to the adoption of quotas and other preferential systems by the employers as preventive measures, in conflict with the legislative intent of Congress (at 992-993). Furthermore, the plaintiff was to identify the employer's use of discriminatory practices and show how these were related to the exclusion of applicants for jobs or promotion (at 995).

Justice Blackmun, on the other hand, took issue with O'Connor's representation of the Court's record on this point. He rejected the plurality's claim that, in the context of a disparate-impact challenge, "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff all the time" (at 1002). He argued that there is a significant distinction between *disparate-impact* and individual *disparate-treatment* claims. Whereas the latter hinges on the plaintiff's ability to establish *intent,* the former focuses on *result,* and while the latter evidence must often be established by inference, the former is "directly established by the numerical disparity" (at 1004). Here a new, but fundamental cleavage within the Court was apparent. The seeds that were sown in the final days of the Court's 1987 term, were to spring into full bloom the following year.

The occasion was provided by a string of cases pertaining to civil rights which were handled by the Court in the spring session of 1989. The series of rulings which were handed down by the Rehnquist Court that season signaled a decisive shift to the right. Typically, former Assistant Attorney General for Civil Rights in the Reagan Administration, William Bradford Reynolds, at the close of the term triumphantly declared: "The Court has said that discrimination is the watchword. It is not going to be underrepresentation or proportionality or statistical imbalance, but discrimination."[13] That seems to be an accurate observation, but it tells only part of the story. What needs to be added is that the Court in the process also tightened the criteria defining discrimination. Actually, by its new line of decisions, the Court revived the debate that President Lyndon B. Johnson had triggered 22 years earlier in a speech at Howard University: "You do not take a person who for years has been hobbled by chains and liberate him, bring him to the starting line of a

13 *National Journal, 8/5/89, p. 1972.*

race and say, 'You are free to compete with all the others,' and still justly believe that you have been completely fair."[14]

The main significance of the rulings in these cases was that the reinterpretations offered by the Court did not so much address the statutory foundation as the superstructure of judicial interpretation of this complex area of adjudication. Actually, in the process the Court had taken a second look at one of the very foundations of civil rights legislation, Section 1981 of the Civil Rights Act of 1866. That law had last been visited in 1976, in *Runyon v. McCrary,* and had then been held to bar private as well as officially sponsored acts of racial discrimination.[15] In 1989, a brief filed on behalf of 145 Representatives and 66 Senators asked the Court not to tamper with precedent (as did a number of briefs *amici curiae,* including some from rather conservative legal scholars). In the case in question, *Patterson v. McLean Credit Union,* the Court unanimously did what the 211 Senators and Representatives asked it to do: retain its 1976 decision in *Runyon v. McCrary,* which interpreted the Reconstruction civil rights statute so as to bar private as well as officially sponsored discrimination.[16]

However, the new hard-core conservative majority (5-4)—Justices O'Connor, Rehnquist, White, Scalia, and Kennedy—then revisited $1981, giving it a new and restrictive interpretation. Justice Kennedy, (symbolically significantly) writing for that majority, found that $1981 covered discrimination in the initial hiring process but not discriminatory treatment on the job.[17]

Even more destructive to the cause of fairness in workplace relations was the Court's decision in the Alaska case *Wards Cove Packing v. Atonio,* involving the canning industry. Here the Court actually shifted the burden of proof in alleged discrimination cases.[18] Since the Court's

14 *Zbid.,* p. 1972.

15 *Runyon et ux, DBA Bobbe's School v. McCrary et al* ., 427 U.S. 160 (1975). The Court made it clear that §1981 is short for 42 U.S.C. $1981 (The Civil Rights Act of 1866, 14 Stat. 27) . In the 1874 process of codifying federal law, what became 42 U.S.C. §1981 was "drawn from both §1 of the 1870 Act and $1 of the 1866 Act" (at 169). The Court further made it explicitly clear that "§1981 likewise reaches purely private acts of discrimination" (at 170).

16 *Patterson* v. *McLean, 491* U.S. 164: "This Court will not overrule its decision in *Runyon* v. *McCrary,* 427 *U*. S . 160, that its $1981 prohibits racial discrimination in the making and enforcement of private contracts. *Stare decisis compels* the Courts to adhere to that interpretation, absent some 'special justification' not to do so."

17 *Patterson v. McLean Credit Union,* 491 U.S. 164, at 176-77 (1989).

18 *Wards Cove Packing Co. et al. v. Atonio et al.,* 490 U.S. 641 (1989).

dictum in *Griggs v. Georgia* (1971) the Civil Rights Act of 1964 had been held to proscribe not only practices which were discriminatory in intent but in operation as well, a position which had been clearly confirmed by the Court as recent as 1987, in *Johnson* v. *Transportation Agency*. A harbinger of the new times had been the Court's decision in *Watkins* (1988), but by its Wards Cove ruling, penned by Byron White, the Court definitely shifted the burden onto the plaintiff to disprove the employer's assertion that the adverse employment action or practice in question rests on legitimate neutral consideration. To make their verdict square with past decisions by the Court (and evade the distinction between disparate-impact and disparate-treatment claims made by Justice Blackmun in *Watkins)* the majority made a new distinction between the burdens of "production" of evidence and "persuasion" by evidence: "The persuasion burden must here remain with the plaintive ..."(at 660). Although neither *Patterson* nor *Wards Cove* were affirmative action cases proper, they were essential to such cases since they affected the burden and standards of proof.

Since *Weber* (1979) voluntary affirmative action plans agreed on by employers and unions had not been held to violate Title VII. Now, *Martin v. Wilks* turned the tables, by stating that a settlement in the form of a consent decree between one group of employees (in this case black firefighters) and their employer (the City of Birmingham) cannot possibly settle, voluntarily or otherwise, the conflicting claims of employees who were no part of the agreement.[19] The Court thereby rejected the "impermissible collateral attack" doctrine which immunizes parties to a consent decree from discrimination charges by nonparties for actions taken pursuant to the decree. Attorneys General of a great number of states had filed briefs *amici curiae* in favor of upholding the consent decree in such cases (at 757-758).

Finally, in *City of Richmond v. Croson,* the Court found that the city had failed to demonstrate "a compelling governmental interest" justifying its set-aside plan for Minority Business Enterprises (MBEs), and thus did not meet the requirement of the strict scrutiny standard of review. The plan required prime contractors to set aside at least 30% of the dollar amount of each contract to one or more MBEs.[20] The nonwhite popu-

19 *Martin et al. v. Wilks et al.,* 490 U.S. *755* (1989).

20 *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989).

lation of the city was about 50%. Justice O'Connor's verdict was clear: "Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, the treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause" (at 511). This seemed to fly straight in the face of the Court's decision in *Fullilove* (1980) .

The 1989 decisions triggered an immediate initiative in Congress to overturn the Court decisions. However, that is not an easy task. For instance, when the Court in 1984, in *Grove City College* v. *Bell,* ruled that federal funds might be used to support schools that practice discrimination in their programs, congressional efforts to overturn that decision became mired in a debate over its possible impact on abortion rights, and it took nearly four years before the Civil Rights Restoration Act finally became law over President Reagan's veto in 1988.

Civil rights bills intended to overturn the Court's *Patterson* and *Wards Cove rulings* were vetoed by President Bush in 1990 and 1991. A revised version finally passed muster and was enacted as Public Law 102-166 on November 21, 1991. Known as the Civil Rights Act of 1991, it rejected the Court's narrow construction in *Patterson* in two subsections: "(b) For the purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," and "(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State Law" (at 1072). It also overturned *Wards Cove* by returning the burden to employers who are sued for discrimination of proving that their hiring practices are "job-related to the position in question and consistent with business necessity."[21] The Act in fact overturned 12 rulings of the Court (and, as a parenthetical note, it might be mentioned that, despite the arduous task involved, in the period between 1967 and 1990, Congress overrode 121 of the Court's statutory rulings, 89 of which were less than 10 years old).[22]

In the meantime, however, the Court had seemed to check its veering motion and take a swing back by its 1990 decision in *Metro Broadcast-*

21 Sec. 105, (a)-(i).

22 David M. O'Brien, *Supreme Court Watch—1992: A* Supplement to *Constitutional Law and Politics,* Volumes One and Two (New York: W.W. Norton & Co., 1992), pp. 27-28.

ing, Inc. v. Federal Communications Commission.[23] Only one term after the Croson ruling, the Court upheld the FCC's set-aside programs for minority contractors. Symbolically significant, in his last opinion for the Court, Justice Brennan was able to pull Justice Byron White across the aisle to join the liberal wing to (1) uphold FCC's "distress sales" program giving preference to prospective minority owners of TV and radio stations when licenses are revoked or basic qualifications to hold the license are scrutinized, and (2) to give enhanced weight to minority ownership when considering licensing in so-called comparative proceedings. The main justification for the ruling was deference to both the expertise of the FCC and the findings of Congress based on the "conclusion that there is an empirical nexus between minority ownership and broadcasting diversity."[24] Hence, according to Brennan, the benefits of ethnically dispersed ownership would "redound to all members of the viewing and listening audiences" (at 465), a concept that amounted to racial stereotyping, in the view of Justice O'Connor.[25] Justice Kennedy, refusing to accept a distinction between invidious and benign discrimination, in his dissent argued that all racial classifications, no matter their purpose, should be subject to strict scrutiny (at 3046).

Justice White's acceptance of Brennan's argument could be compared to Justice Powell's willingness in the Bakke case (1978) to accept race as one factor among many to achieve a diverse student body. White's replacement, Ruth Bader Ginsburg probably holds a similar view, which would indicate a majority for the "diversity" concept in future rulings in such cases. However, much hinges on Justice Blackmun's successor, Stephen G. Breyer, a pragmatic centrist who has no clear track record in affirmative action cases, but who has shown intellectual capacity and stamina in his voting patterns on the 1st Circuit Court of Appeals.[26]

It is not easy, on the basis of the Court's decisions in affirmative action cases, to discern a clear and consistent line of principle in its rulings. Nonetheless, certain generalizations may safely be made: (1)

23 *Metro Broadcasting, Inc. v. Federal Communications Commission,* 111 L Ed 2d 445.

24 111 L Ed 2d 445 at 466.

25 110 S.Ct. 2997 at 3037, 3038.

26 "Stephen Breyer: The Pragmatic Choice for the Court," in *The Washington Post Weekly,* May 23-29, 1994, pp. 14-15; "The Practical Idealist," WPW, July 4-10, 1994, pp. 6-7; "Breyer could be force on the court," USA *Today,* May 17, 1994.

Certain affirmative-action measures may pass muster in hiring, but not in firing. (2) Rigid quotas are out, but timetables and goals may be acceptable under certain circumstances. A 50-50 hiring and promotion quota may be accepted as a *remedy* to increase nonwhite membership in the work force or in labor unions where discriminatory practices have been proven (Local #93; Paradise). Such a device may even be used to reach a specific percentage goal in such cases (Local #28). Set asides are acceptable as a remedy used by Congress to make up for past wrongdoings, but not for a state or a city, a reasoning which has shaky foundations even within the Court.

In the general political debate, the "innocent victim" concept has been a central argument against affirmative action measures, but a majority on the Court has been willing to modify the sweeping force of this doctrine, as witnessed in *Wygant.* The "colorblind Constitution" concept has been almost equally ubiquitous, along with the "demeaning effect on minorities" argument. On the other hand, President Johnson's "hobbled slave" image has proven effective among the justices. On the question of disparate impact analysis the Court is divided, making possible a decisive early impact on affirmative action by the recent appointees. The bottom line so far is that color-conscious affirmative-action measures have been accepted by a solid majority as being broader than mere "make-whole" provisions.

In general, the future of affirmative action seems quite open-ended, but by now the principle of *stare decisis* is working for the concept of affirmative action, since such programs are so widespread: They have become an integral part of the American social fabric.